Supreme Court, U.S.
FILED
DEC 12 1998
CLERK

No. 98-761

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WILLIAM C. MARTIN,
Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22 pp

QUESTION PRESENTED FOR REVIEW

The question presented is whether the U.S. Court of Appeals for the Eleventh Circuit properly determined that Victor Baugh did not violate clearly established law, and that qualified immunity therefore shields him from this suit.

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BRIEF IN OPPOSITION

Respondent Victor Baugh respectfully submits this Brief in Opposition to William C. Martin's Petition for Writ of Certiorari. As shown herein, Martin has incorrectly stated the facts, and has incorrectly described the reasoning of the Court of Appeals. The Eleventh Circuit simply applied mainstream principles of qualified immunity to a unique set of facts, reaching a result which is correct under any reasonable view of qualified immunity doctrine. *Martin v. Baugh*, 141 F.3d 1417, *reh'g denied*, 156 F.3d 188 (11th Cir. 1998). No question is presented which merits this Court's review.

STATEMENT OF THE CASE

This case is about qualified immunity for an individual defendant sued under 42 U.S.C. § 1983. A public employee, petitioner Martin, claims that his supervisor, respondent Victor Baugh, violated his First Amendment "free speech" rights.

It is therefore important to note at the outset that the Petition incorrectly states the nature of the "speech" at issue. The case has its roots in efforts by the City of Birmingham, Alabama to acquire a new radio communications system. Baugh is the head of the City's Communications Department; Martin worked in that department as a radio technician. Martin portrays himself as having "disclos[ed] . . . that City officials were violating bid laws", (Petition at i), calling himself a "whistleblower" (*id.* at 10) who "spoke out against corruption" (*id.* at 16).

The undisputed facts show quite a different picture. First, as the District Court noted (Appendix to Petition at 13a), "Martin categorically denies ever having charged Baugh, or, for that matter, anybody else at City Hall, with having done anything illegal or with having committed malfeasance in their support of the efforts of Motorola to obtain a contract with the City . . ." In short, the record shows undisputedly that Martin did *not* speak of (or "blow the whistle on") governmental corruption or violations of law.[1]

Second, the record in this case includes many undisputed facts which (as discussed later in this Brief) weigh against Martin's efforts to pierce Baugh's qualified im-

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[1] In addition, it may be noted that the District Court's judgment in the somewhat related bid-law case, on which Martin's Petition heavily relies (e.g., Petition at 2-3, 4, 16), is a nullity; it was reversed, and remanded with instructions to dismiss, because the District Court lacked subject matter jurisdiction. *Ericsson GE v. Motorola*, 120 F.3d 216 (11th Cir. 1998).

munity. For instance, the record reveals beyond genuine dispute:

- Far from blowing whistles about corruption, Martin repeatedly told Baugh that his "speech" was merely about technical aspects of radio equipment. For instance, one of the central episodes on which Martin bases his claim was a meeting of the Fraternal Order of Police which he attended. He gave Baugh the following description of his words at that meeting: "I answered technical questions about the systems . . . I am a technician, and they wanted to ask technical questions about the systems."

- The primary episodes of "speech" which are at the core of the case took place *after* the City's Mayor, and the City Council, had made and announced their decision to purchase a radio system from Motorola rather than from the vendor whom Martin preferred (Ericsson GE). To the extent Martin was attempting to urge a purchase from GE, therefore, it was a 13th-hour attempt to undermine a purchasing decision which had already been made by the City officials who had responsibility for such matters.

- When Baugh inquired of Martin in an attempt to determine what "speech" Martin had engaged in, Martin intentionally decided *not* to give Baugh complete information. For example, Martin intentionally did *not* tell Baugh of the existence of one of the episodes of "speech" on which Martin bases his claim. In fact, he clearly implied to Baugh in writing that the episode (a meeting with a City Councilmember in January 1994) did not occur.

- Martin's own words to Baugh showed that at least part of Martin's motivation, in preferring GE's system over Motorola's, was concern for his own job security; Martin expressed his concern to Baugh that, in other cities which had contracted

with Motorola for radio systems, the municipal radio shops had thereafter been shut down.[2]

- In conversations with Martin expressing his disapproval of Martin's actions, Baugh repeatedly expressed his concern that Martin had disrupted and ignored the proper chain of command. For example, though the City's governing law states that municipal employees are to work under the direction of the Mayor and not of the Council, Martin met with a Councilmember during working time, and gave information to the Councilmember prior to giving it to Baugh or to the Mayor. Furthermore, Martin gave the Councilmember a written recommendation regarding radio technologies which purported on its face to come from a division of the City's Department of Communications—without the approval, or even the knowledge, of Baugh (who headed that Department)—which carried the incorrect implication that Martin was speaking officially on behalf of some portion of City government.

These facts are undisputed in the record. Though of course Martin may "dispute" some of them in the sense of alleging otherwise, the record unequivocally supports these facts and there is no "genuine issue" about them. *See* Fed. R. Civ. P. 56.[3]

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[2] Martin disputes, of course, that he was motivated by his own economic self-interest; but his words, as closely paraphrased in the text above, certainly could have conveyed that impression to a reasonable person in Baugh's position.

[3] Baugh also disagrees with aspects of Martin's Petition insofar as it describes alleged harassment and retaliation by Baugh. (Petition at 3-4, 16). It is not necessary to engage in debate over those issues in this Court, however. The decision of the Court of Appeals was based on its conclusion that Martin's "speech" was not clearly established as protected, rather than being based on analysis of Baugh's actions; and the Questions Presented by Martin are similarly limited.

ARGUMENT

This case is about qualified immunity for an individual defendant sued under 42 U.S.C. § 1983. Qualified immunity is the shield which protects public officials against liability, and even against the burdens of suit, so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity serves to protect the government, and thus the public, from the enormous costs which would flow from unchecked individual liability; those costs include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816.

In addition to being based on an incorrect picture of the facts (as described above), the Petition is based on an incorrect picture of the opinion and the reasoning of the Eleventh Circuit. The Court of Appeals did not apply an "extreme" (Petition at 16) view of qualified immunity, at odds with decisions of this Court. Instead, the principles applied by the Court of Appeals are mainstream qualified immunity law, as developed by this Court and by the various Circuits. The Court of Appeals merely applied those settled mainstream principles to the unique facts of this case, and held that Martin had failed to show any violation of clearly established law.

This case therefore presents no identifiable issue worthy of certiorari review. Indeed, Baugh would be entitled to judgment in his favor on *any* reasonable formulation of qualified immunity law. No matter how one might reasonably define what precisely is meant by "clearly established law" for qualified immunity purposes. Baugh violated no such law. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS APPLIED MAINSTREAM PRINCIPLES OF QUALIFIED IMMUNITY WHICH ARE CONSISTENT WITH, AND EVEN MANDATED BY, THIS COURT'S QUALIFIED IMMUNITY DECISIONS

The primary thrust of the Petition is its suggestion that the principles of qualified immunity followed by the Court of Appeals in this case are in conflict with this Court's decisions in *U.S. v. Lanier*, 520 U.S. 259 (1997) and *Crawford-El v. Britton*, —— U.S. ——, 118 S.Ct. 1584 (1998).[4] In essence, the Petition argues that the Eleventh Circuit required a plaintiff to find a precedent with nearly identical facts in order to show that the law was clearly established (a supposed conflict with *Lanier*), and that the Eleventh Circuit impermissibly placed a new and heightened burden of proof on a plaintiff seeking to overcome qualified immunity (a supposed conflict with *Crawford-El*).

The Petition incorrectly reads the opinion below. There is, in fact, no conflict with *Lanier* (which dealt with the

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[4] The supposed conflict with *Lanier* and *Crawford-El* is the basis for Sections I and III of the Petition's Argument. The question sought to be presented by Section II of the Petition, pp. 12-13, is unclear to Baugh. If Martin is urging that the balancing test of *Pickering v. Board of Ed.*, 391 U.S. 563 (1968), is a defense to, rather than an element of, a public employee's First Amendment claim, that issue is merely academic in this case. Nothing in the proceedings below suggests that the allocation of the burden of proof on that issue would make any difference to this case; and if Baugh had any burden of coming forth with evidence on the *Pickering* test, he met it. *See* Appendix to Petition at 16a (Baugh's motion for summary judgment, supported by evidence including his sworn declaration and Martin's deposition testimony).

Perhaps Martin is suggesting that a court analyzing qualified immunity in a First Amendment public employment case should ignore the *Pickering* balancing test altogether. It is sufficient to say that there is absolutely no support for that contention, and the contention is unworthy of this Court's review. The governing law on the merits of a claim—whether a First Amendment claim or any other sort—cannot be selectively ignored in a qualified immunity analysis.

somewhat analogous issue of "fair warning" in criminal law) or with *Crawford-El*. Quite to the contrary: to the extent the Court of Appeals applied a rather demanding standard for a plaintiff seeking to overcome qualified immunity, that standard was consistent with *and even mandated by* this Court's decisions on qualified immunity.

It is, first of all, true that the Court of Appeals used precedent as the starting point for determining whether Baugh's actions violated clearly established law. (Appendix to Petition, 6a-7a & n.7; 141 F.3d at 1420-21 & n.7). It is well established that this is the correct approach. *See, e.g., Elder v. Holloway*, 510 U.S. 410 (1994) (discussing use of precedent in determining whether law was clearly established for qualified immunity purposes); *Harlow v. Fitzgerald*, 457 U.S. at 818 & n.32 (1982) (referring to use of precedent in determining existence of clearly established law).

And it is true, as well, that the Court of Appeals did not allow Martin to overcome Baugh's qualified immunity through mere reference to generalizations (such as the generalization that public employees have certain free speech rights under the First Amendment), but instead required Martin to show that the law was clearly established that the particular speech at issue in this case was constitutionally protected. (Appendix to Petition, 5a-6a; 141 F.3d at 1420). It is well established that this, too, is the correct approach. As this Court noted in *Crawford-El* itself, 118 S.Ct. at 1594, "[e]ven when the general rule has long been clearly established (for instance, the First Amendment bars retaliation for protected speech)", qualified immunity may protect the defendant because "there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern)". *See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (holding that qualified immunity analysis cannot end with generalizations but must focus on the specific facts at hand).

But the Court of Appeals did *not* hold that a plaintiff must always identify a precedent with materially similar facts, in order to overcome qualified immunity. (The Court of Appeals certainly did not replicate the error of the lower court in *Lanier*, which had required precedent *from this Court* with an extreme degree of factual similarity. *Lanier*, 520 U.S. at 268). Instead, the Court of Appeals recognized that Martin could overcome the immunity *either* by citing a precedent which held speech materially similar in all respects to his to be protected, *or* by showing that no reasonable person could believe that his speech lacked constitutional protection. (Appendix to Petition, 6a-7a, 141 F.3d at 1420-21 [5]). Therefore, to the extent that this Court in *Lanier* recognized that people may be on notice of *some* legal requirements even without a case directly on point, the decision below is in harmony. *See Lanier*, 520 U.S. at 271 (while some situations may require precedent with "a very high degree of prior factual particularity", other situations might not). There may be some easy cases in which every reasonable person would agree that a public employee's speech is protected, even when no similarly situated employee has had to prove the point through prior reported litigation; the Court of Appeals so recognized, but held that this was not such a case.

Nor did the Court of Appeals add any "burden" on the plaintiff in qualified immunity cases, in any sense which would conflict with this Court's decision in *Crawford-El*. The error of the lower court in *Crawford-El* was that it had imposed a heightened *evidentiary* burden (i.e., a requirement of proof by "clear and convincing evidence")

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[5] "Unless the plaintiff can *either* produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected, . . . *or* show that, on the facts of his case, no reasonable person could believe that both prongs of the [*Pickering-Connick*] test had not been met, he cannot defeat a defense of qualified immunity." (emphasis supplied).

which was not justified by the *legal* doctrine of qualified immunity. *Crawford-El*, 118 S.Ct. at 1592. When this Court disapproved in *Crawford-El* of "plac[ing] a thumb on the defendant's side of the scales", *id.* at 1594, the Court was not purporting to dilute the legal test for qualified immunity but was instead declining to impose an evidentiary standard greater than "preponderance of the evidence". The Court of Appeals in this case did not apply any evidentiary burden other than the "preponderance" test, and so did not ignore the lessons of *Crawford-El*. *Crawford-El* does not, as Martin would have it, stand for the general proposition that qualified immunity should be a weak protection.

Likewise, the decision below is unremarkable in its recognition that qualified immunity is a particularly forceful defense in First Amendment public employment cases, as compared to some other sorts of § 1983 cases. (Appendix to Petition at 6a, 141 F.3d at 1420). As the Court of Appeals recognized, "clearly established law" is particularly hard to find in these cases, because the underlying law on the merits in such cases is very fact-specific and involves balancing tests rather than bright-line rules, and so qualified immunity is a particularly strong defense. (*Id.*). This recognition, far from being an extremist view as Martin suggests, has been echoed by many other Circuits. The Ninth Circuit, for instance, recently emphasized the very same principles, and cited a large number of cases from many other Circuits which are in accord. *Brewster v. Bd. of Educ. of Lynwood U. School Dist.*, 149 F.3d 971, 979-80 (9th Cir. 1998). The same view has also been expressed quite forcefully by legal commentators. *See, e.g.*, 1B Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses*, § 9.23 (3rd ed. 1997):

> When the constitutional principle at issue requires a balancing of competing interests, such as between

> an employee's interest in free speech and the state's interest in the efficiency of its operations, the courts insist on a greater degree of factual correspondence between the case at hand and the existing case law in order to overcome qualified immunity. Given the case-by-case balancing that must take place, there will be relatively few bases for an a priori judgment that the action taken violated clearly established federal constitutional law. . . . [I]n these circumstances the qualified immunity defense is especially difficult to overcome . . .

(footnotes omitted). *See also Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) (noting that it is "self-evident", and "a simple matter of logic", that the law in First Amendment public employment cases is rarely so clearly established as to overcome qualified immunity).

With the foregoing explanation, it is clear that the decision of the Court of Appeals does not conflict with this Court's holdings in *Crawford-El* and *Lanier*. It is likewise clear that the decision below is well within the mainstream in its approach to qualified immunity in First Amendment public employment cases.

Thus, in the end, Martin's contention is simply that the Court of Appeals was too "emphatic" (Petition at 10) about qualified immunity. Ultimately the difference between the standard which Martin suggests, and the standard which the Court of Appeals applied, is not one of *kind* but of *degree*. His objection in the end is to the nuances, the adjectives which the Court of Appeals used to explain its view of what constitutes clearly established law. *See, e.g.*, Petition at 8 (complaining that the Court of Appeals focused on what is "obvious" rather than on what is "apparent"); *id.* at 10 (complaining that the Court of Appeals held that law is clearly established only if it is "clear" to "every reasonable person").

It will be shown in the next section that, even if this Court wished to consider the possibility of fine-tuning the

qualified immunity standard so as to make it somewhat easier for plaintiffs to overcome, this is not the case in which to take up that possibility. The reason is that, on the undisputed facts in this case, Baugh is immune under *any* reasonable view of what constitutes "clearly established law"; and so nudging the standard one way or the other should not alter the outcome in this case.

Here, however, there is a different point: to the extent that the Court of Appeals utilized "emphatic" adjectives and adopted a strong view of qualified immunity, the Court of Appeals was correctly following this Court's existing precedents on the subject. For an "emphatic" view of qualified immunity, and one which makes the immunity an extremely powerful shield, one must only review this Court's words in *Malley v. Briggs*, 475 U.S. 335 (1986). This Court held that qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341. Though Martin suggests that the Court of Appeals erred in defining clearly-established law by reference to what is "obvious" (Petition at 8), this Court in *Malley* utilized precisely that same term. And though Martin suggests that the Court of Appeals erred in holding that law is clearly established only if it is clear to "every" reasonable official (Petition at 10), that formulation is logically equivalent to the one which this Court utilized in *Malley*:

> Defendants will not be immune if, on an objective basis, it is *obvious* that *no* reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

475 U.S. at 341 (emphasis supplied).

In short, the Petition has identified no way in which the decision below conflicts with precedent from this Court or from the other Courts of Appeals. To the contrary, the decision below is an unremarkable application

of settled principles. Nor does the Petition offer any reason for this Court to overrule its own precedent in order to alter the existing standard for qualified immunity. There is therefore no reason for this Court to grant review.

II. ON *ANY* REASONABLE VIEW OF WHAT CONSTITUTES "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY PURPOSES, BAUGH VIOLATED NO CLEARLY ESTABLISHED LAW; THUS, POTENTIAL DEBATES ABOUT THE PRECISE CONTOURS OF QUALIFIED IMMUNITY LAW ARE NOT RELEVANT TO THIS CASE

Even if this Court perceived a need to grant certiorari in some case in order to discuss the precise contours of qualified immunity—that is, to explain precisely how to determine whether a principle of law is "clearly established"—this case is not a proper vehicle for such discussion. The reason is that, on *any* reasonable view of what constitutes "clearly established law" for qualified immunity purposes, Baugh violated no clearly established law. For this reason, too, this case should not even be held until the Court has decided other pending cases which *might* turn on qualified immunity, with the prospect of a possible "remand for reconsideration" in light of those decisions.[6] In order to spare Baugh further distraction from his public duties, Baugh respectfully submits that review should simply be denied in this case forthwith.

Unless the Court were to abandon entirely the concept of "clearly established law" as the test for qualified immunity—a result which even Martin has not advocated—qualified immunity will continue to depend on an objective standard which compares the defendant's actions to

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[6] *See Conn v. Gabbert*, No. 97-1802; *Hanlon v. Berger*, No. 97-1927; *Wilson v. Layne*, No. 98-83. Each of those cases *might* turn on qualified immunity, or might instead be resolved by a determination that the defendants violated no constitutional right (clearly established or otherwise).

the law as it existed at the time the defendant acted. *See Harlow*, 457 U.S. at 818 (defining qualified immunity by this objective standard). There are, as a matter of logic, various conceivable ways of formulating that standard along a spectrum of difficulty, so as to make it more or less protective of public officials. But no matter where on that spectrum of difficulty the standard might ultimately be placed, certainly no public official can possibly be said to have violated "clearly established law" if there is support for a substantial argument that his conduct (on the undisputed facts) did not in fact violate the law *at all*. The phrase "clearly established law" surely carries at least that much protection for public officials; a right is obviously not "clearly established" if caselaw supports a rather good argument that it is not a right at all.

To grant public officials only that little protection—requiring the defendant to show not merely that then-existing law failed to condemn his specific conduct as unlawful, but further that caselaw in fact provides substantial support for the view that his actions were lawful—would be an extreme dilution of qualified immunity doctrine, which currently protects "all but the plainly incompetent or those who knowingly violate the law," *Malley*, 475 U.S. at 341. But even if protected only by that extremely diluted version of qualified immunity, a new version which would require *him* to offer a substantial precedent-based argument that in fact he violated no law at all, Baugh would still prevail in this case.

Baugh has a substantial argument, for instance, that Martin's speech was not constitutionally protected (and *a fortiori* was not "clearly established" as protected) because it constituted a "13th-hour" attempt by a public employee to sway a decision which had already been made by his superiors who were responsible for making such decisions. A reasonable person in Baugh's position could certainly have believed that such speech is not con-

stitutionally protected, because its disruption of effective government outweighs any possible beneficial effects. The core instances of Martin's speech, it may be recalled, were made *after* the City's Mayor *and* the City's Council had publicly and officially decided to purchase a radio system from Motorola rather than from GE. Yet Martin, speaking from his position within the City's Department of Communications, continued to urge purchase of the GE system even though persons higher in the chain of command had already made their final decision.

The reasonableness of a belief that such speech was not protected is shown, for instance, by caselaw from the Seventh Circuit decided shortly after the events at issue in this case. The Seventh Circuit's opinion, although rendered in a case with some differences from this one, set forth a substantial constitutional basis for believing that speech like Martin's is not protected:

> [R]elevant departmental decisionmakers have a responsibility to use their judgment in choosing an official position . . . , and may reasonably expect that their judgment will not be sideswiped by an independent submission . . . by a subordinate who fought and lost the internal policy battle but still hopes to win the war. In discharging their important duties, state agencies rely upon unified chains of command through which disparate sources of information may be filtered and evaluated in the process of reaching and executing difficult, and often controversial, decisions. Vigorous debates within the agency, even at the eleventh-hour, are to be expected, but at a certain point the department's position must be set firmly if the department is to function. Agency decisionmakers may then punish thirteenth-hour attempts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree.

Wright v. Ill. Dep't of Children & Family Services, 40 F.3d 1492, 1504 (7th Cir. 1994). Therefore, even if a

diluted version of qualified immunity required Baugh to identify caselaw which supports his view of constitutional law, Baugh would be immune in this case. There is substantial support for the belief that a public employee has no constitutional right to keep debate about a purchasing decision ongoing, after responsible officials have made and announced their decision.

More generally, this belief would find strong support in the plurality opinion in *Waters v. Churchill,* 511 U.S. 661 (1994), decided within a very few months after the central events in this case. The plurality noted that a governor can, consistent with the First Amendment, fire a deputy who publicly criticizes his legislative program. "The reason . . . is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively." *Id.* at 675. Similarly, Baugh (as Head of the City's Department of Communications) could reasonably have believed that he and his staff could more effectively do their job of implementing the decision made by the Mayor and Council, if part of his staff was not still busy undermining that decision.

Moreover, even aside from the timing of Martin's "speech", Baugh would have had a substantial precedent-based argument that Martin's speech was not constitutionally protected because it was merely technical talk by a city employee, within the city government, about technical matters within the expertise of his job function.[7]

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[7] As discussed earlier in this brief, Martin told Baugh that his "speech" was of that nature: "I answered technical questions about the [radio] systems . . . I am a technician, and they wanted to ask technical questions about the systems." A qualified immunity analysis must focus on the facts as known to Baugh at the time, and not on some hindsight assertion by Martin that his speech was really of a different nature. *See Anderson v. Creighton,* 483 U.S. at 641 (qualified immunity analysis depends on information as known to defendant at the time). *See also Waters v. Churchill,* 511 U.S. 661 (1994) (plurality opinion) (First Amendment analysis in

Indeed, the District Court in this very case recognized the strength of such an argument: "[I]t is true that an internal difference of opinion within a municipality's hierarchy over a technical or a financial matter does not ordinarily present a matter of constitutionally protected speech. Except in unusual circumstances such internal disagreements do not enjoy First Amendment protections."[8] (Appendix to Petition, 13a). That settled and undisputed principle offers another substantial basis for believing that Martin's speech was not constitutionally protected; and thus, again, it cannot possibly be said that his speech was "clearly established" as protected.

Furthermore, Baugh would have had even more substantial reason for believing that Martin's speech was not constitutionally protected, because (i) Baugh could have reasonably understood, based on Martin's own words to Baugh, that Martin's activity was motivated at least in part by his own economic self-interest[9]; and (ii) Baugh

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public employment cases depends on what the employer reasonably understood the employee's verbal activity to have been).

[8] The District Court sought to except this case from the general rule quoted above, on the basis that Martin's words "*could* easily have been construed" by listeners to imply something more than a disagreement over technical matters, based on "*circuitous and subtle*" inferences, and that this would have been "*a* fair interpretation" of his technical talk. (Appendix to Petition, 13a-14a (emphasis supplied)). This was a complete inversion of qualified immunity doctrine. The proper question is not whether one can imagine a "circuitous and subtle" spin on the facts which would make the defendant's action appear unlawful. It is, instead, whether the defendant could reasonably have believed that his actions were lawful in light of what he knew at the time. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact").

[9] As discussed above in the Statement of Facts, Martin told Baugh of his concern that, in other cities which had contracted with Motorola for radio services, the municipal radio shops had

could reasonably have understood that Martin's actions created the false public impression that Martin was speaking with some official authority (as when, for instance, Martin disseminated his views on letterhead putatively from the "Radio and Electronics Division" of the City's Department of Communications). Given those facts, Baugh could reasonably have feared that Martin's actions might create the public impression that government authority was being used in the economic self-interest of municipal employees, rather than being based on the public good. And Baugh could have reasonably believed that such an impression is extremely detrimental to the effectiveness of government.[10]

In summary, there is a substantial basis, even now, to believe that Martin's "speech" was *not* constitutionally protected. Therefore, even if the shield of qualified immunity were drastically weakened, it would still protect Victor Baugh. For that reason, this is not the proper case in which to fine-tune the standard for qualified immunity; and any fine-tuning which the Court might undertake in other cases would not even justify any reconsideration of this case. Accordingly, there is no reason to keep this case alive, distracting Baugh from his public duties, any longer.

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been shut down; thus Baugh could reasonably have understood that Martin's preference for GE was motivated at least in part by a belief that his own job would be more secure if the City contracted with GE.

[10] Martin's use of putative "letterhead" in his attempt to undermine the decision of the Mayor and Council could have created, at the very least, the impression that the Department of Communications was in disarray, with no clear chain of decision-making authority. That in itself is sufficiently detrimental to the functioning of government, to make a reasonable argument that (even if for that reason alone) Martin's "speech" was unprotected.

CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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